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No. 09-882

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOHN DAVID RUELAS
Petitioner,

v.

HUGH WOLFENBARGER, WARDEN
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Where (1) the factual predicate to the question raised is disputed, and (2) the claim arises in a legal setting that is specific to Michigan, and (3) Petitioner did not allege that he would not have pled guilty without consideration of the lesser charge of manslaughter, does this case present a good vehicle in which to address the question presented by Petitioner?

PARTIES TO THE PROCEEDING

Since filing his habeas petition, Petitioner has been transferred to the Bellamy Creek Correctional Facility in Ionia, Michigan. That facility's warden is Kenneth T. McKee.

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JURISDICTION

The State of Michigan agrees with Petitioner's jurisdictional statement.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant constitutional provisions are set forth in Petitioner's petition. Pet. 3.

Regarding the relevant statutory provisions, the prisoner challenged the basis of his confinement under 28 U.S.C. § 2254 of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in habeas corpus, which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With regard to factual determinations by the State court under 28 U.S.C. § 2254(e)(1), the federal

courts must accord a presumption unless rebutted by clear and convincing evidence:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

On July 17, 2002, Petitioner pled guilty to open murder, Mich. Comp. Laws § 750.316, in return for the prosecution dismissing the second felony offender charge, Mich. Comp. Laws § 769.10. Following a degree hearing held July 29, 2002, the State trial court found him guilty of second-degree murder on August 2, 2002. Mich. Comp. Laws § 750.317. Subsequently, on August 15, 2002, the State trial court sentenced him to 20 years and 10 months to 40 years.

When he pled guilty, Petitioner admitted to striking his mother about three times on January 24, 2002, killing her. His mother was seventy-six-years old. He had also assaulted her in the past.

The medical examiner testified that Petitioner's mother died from multiple blunt force trauma. She had massive contusions, including one on the adrenal gland. This last contusion required the type of force that one would receive in a car accident. She also had numerous fractured ribs and acute brain swelling.

When they arrived, the police found blood splatters on a wall and a chair. Although Petitioner initially denied having assaulted his mother, he eventually admitted it. Both at the degree hearing and at sentencing, the prosecution presented certain photographs. Five of them are in the record.

Petitioner appealed by right.[1] On September 17, 2002, however, the Michigan Court of Appeals dismissed the appeal by right for lack of jurisdiction. It concluded that Petitioner was appealing from a plea-based conviction, and there is no appeal by right in Michigan from such a conviction.

Eventually, Petitioner filed a *pro se* motion to withdraw his plea. Later, his appellate lawyer also filed a motion to withdraw the plea, subsuming the earlier one. On January 5, 2004, the State trial court denied the motion.

Afterward, Petitioner filed a *pro se* motion for resentencing. On January 9, 2004, the State trial court construed it as a motion for relief from judgment, Mich. Ct. Rule 6.500, *et seq.*, and denied it.

Petitioner then appealed to the Michigan Court of Appeals, raising only the issues raised in his first motion to withdraw the plea. On March 3, 2004, that court denied leave to appeal.

Subsequently, on November 29, 2004, the Michigan Supreme Court also denied leave to appeal. *People v. Ruelas*, 471 Mich. 927; 689 N.W.2d 230 (2004). On February 28, 2005, it denied Petitioner's motion for reconsideration. *People v. Ruelas*, 472 Mich. 870; 692 N.W.2d 844 (2005).

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[1] The following chronology simplifies what has happened on appeal. Like *Apanovich v. Houk*, 466 F.3d 460, 462 (6th Cir. 2006), it has something of a "tortured procedural history." At times, Petitioner has simultaneously filed motions with more than one court.

Not long after the Michigan Supreme Court denied leave to appeal in the first appeal, Petitioner filed his second application to the Michigan Court of Appeals. This time, he raised the issues raised in his *pro se* motion for sentencing (the one denied on January 9, 2004). On July 29, 2005, the Michigan Court of Appeals again denied leave to appeal.

Subsequently, on November 29, 2005, the Michigan Supreme Court again denied leave to appeal. *People v. Ruelas*, 474 Mich. 940; 706 N.W.2d 24 (2005). It then again denied reconsideration on February 27, 2006. *People v. Ruelas*, 474 Mich. 1067; 711 N.W.2d 27 (2006).

On March 31, 2008, in the habeas corpus challenge to his conviction, the federal district court denied each of Petitioner's issues except one. The federal district court concluded that it "cannot conclude that outcome of Petitioner's case was unattributable to the trial court's error." Pet. App. 36a. The opinion went on to point out that Petitioner had alleged in his motion to withdraw his plea that "he would not have pled guilty to open murder if he had known that his plea to open murder would have precluded the trial judge's consideration of a manslaughter conviction." Pet. App. 36a. The federal district court further reasoned that the State trial court did not explicitly "reference manslaughter in announcing his finding of second-degree murder." Pet. App. 36a.

The State of Michigan then appealed by right to the U.S. Court of Appeals for the Sixth Circuit. In an opinion written by Judge Boyce Martin, on September 8, 2009, that court reversed. The Sixth Circuit noted

that the record "is ambiguous what [the trial court] in fact considered . . . . Indeed, the circuit court simply never used the word manslaughter[.]" *Ruelas v. Wolfenbarger*, 580 F.3d 403, 409 (6th Cir. 2009). The opinion then noted that Petitioner presented very little evidence at the degree hearing that would have allowed the trial court to have found manslaughter: "the presence of provocation was something Ruelas was required to prove, and the fact that the circuit court did not mention manslaughter does not automatically mean that it did not consider it; Ruelas offers little evidence of provocation." *Ruelas*, 580 F.3d at 410.

The opinion then went on to state that "the 'benefit of the bargain' [that Petitioner allegedly was denied] is the opportunity to be considered for manslaughter." *Ruelas*, 580 F.3d at 411. It then concluded, in light of the lack of evidence that supported a manslaughter verdict, any error was harmless because the judge would have found second-degree murder even if he had explicitly considered manslaughter:

> Ruelas's only support for his contention that he merited only manslaughter and not second-degree murder, was that his mother provoked him when she slapped him across the face and told him not to refer to his ex-wife as a "bitch." . . . This is not powerful evidence. Moreover, that the circuit court, at the degree-hearing, did not explicitly "rule out" manslaughter is of no moment because it was not the government's burden to prove it. And, we believe, had the judge considered

manslaughter at Ruelas's degree-hearing, he would have still been found guilty of second-degree murder because he proffered no evidence establishing sufficient "provocation" under Michigan law. As a result, the failure to consider manslaughter did not have a substantial and injurious affect on Ruelas's chance of receiving a manslaughter charge, as the charge of second-degree murder was well supported and Ruelas offered little evidence of provocation. [*Ruelas*, 580 F.3d at 413-14.]

REASONS FOR DENYING THE PETITION

This petition presents a poor vehicle in which to examine the question raised by Petitioner for three reasons.

First, the factual predicate to the claim is in dispute – the Sixth Circuit opinion assumed that the plea was involuntary but the State of Michigan contends that Petitioner did receive the benefit of the bargain. Petition has failed to show otherwise. Thus, the issue is fact bound, and is dependent on a state court record, which itself is not clear.

Second, the case relates to an unusual legislative scheme – which apparently is unique to Michigan – and the remedy would be nothing more than having the State trial court issue a new finding on guilt, this time expressly considering manslaughter despite the lack of evidence that the crime was manslaughter.

Third, Petitioner did not even allege that he would not have pled guilty if he had known that the State trial court would not have considered manslaughter. Rather, he merely contended that he would like to withdraw his plea.

This Court should deny the petition for certiorari.

1. Petitioner has failed to carry his burden to demonstrate that he did not receive the benefit of his bargain.

No court has the authority to grant a writ under 28 U.S.C. § 2254 for decisions that are merely incorrect.[2] Instead, the State court's decision denying the constitutional claim must be either contrary to or unreasonably apply established Supreme Court precedent.[3] The decision must violate clearly established holdings.[4]

Petitioner claimed that his plea to open murder was involuntary and was a structural error because the State trial court did not consider manslaughter as promised in the plea agreement. Although the State of Michigan argued that the State trial court did consider manslaughter, the Sixth Circuit "assumed" that the State trial court did not consider manslaughter and that the plea was "involuntary" for purposes of review – it then determined that the constitutional error did not have a substantial and injurious effect on his conviction under *Brecht v. Abrahamson*. *Ruelas*, 580 F.3d at 410, 413-14.[5]

The analysis of the Sixth Circuit was predicated on *Puckett v. United States*, in which this Court noted that the failure to provide a criminal defendant with the benefit of his plea bargain was subject to plain error, which includes an analysis of prejudice under

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[2] *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007).

[3] *Wright v. Van Patten*, 552 U.S. 120, 125-26 (2008).

[4] *Williams v. Taylor*, 529 U.S. 362, 412 (2000)(O'Connor, J. for the Court).

[5] Citing *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993).

the third prong of the test.[6] As in *Puckett*, here there was no contemporaneous objection – Petitioner did not claim that the State trial court had failed to consider manslaughter when the court issued its decision on August 2, 2002.

Thus, in *Puckett*, this Court noted that a violation of the terms of the plea bargain could be subject to analysis of prejudice under the plain error doctrine.[7] This Court has not previously addressed whether an involuntary plea could be subject to harmless error analysis. Consequently, even if assumed to be an involuntary plea, the decision of the State courts would not be an objectively unreasonable application of clearly established Supreme Court precedent.[8]

But this Court need not reach this issue because Petitioner never demonstrated the point "assumed" by the Sixth Circuit – that he did not receive the benefit of his bargain. This case is dependent on a disputed factual record. The issue that Petitioner seeks to raise is only implicated based on a particular reading of the record. The State of Michigan contends that Petitioner received the benefit of his bargain and that Petitioner has failed to show otherwise.

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[6] *Puckett v. United States*, 556 U.S. ___, 129 S. Ct. 1423, 1433 (2009).

[7] *Puckett*, 129 S. Ct. at 1432 ("we see no need to relieve the defendant of his usual burden of showing prejudice").

[8] *See, e.g., Berghuis v. Smith*, 557 U.S. ___; 2010 U.S. LEXIS 2925, *32 (reaffirming that the State court decision must be an unreasonable application of clearly established Supreme Court precedent).

The petitioner has the burden of establishing a constitutional violation. Under 28 U.S.C. § 2254(a), a federal court may entertain a claim that a person is held in custody pursuant to a State court judgment on the ground that he is being held "in violation of the Constitution or laws or treaties of the United States." The burden is on the person in custody to demonstrate that he is entitled to habeas relief.[9]

Michigan's procedure allowing a criminal defendant to plead guilty to open murder is apparently particular to Michigan. Mich. Comp. Laws § 750.318 allows a defendant to plead guilty to open murder, thus requiring the trial court to hold a hearing on which degree to enter as the verdict. Petitioner not only pled in return for the second felony offender charge under Mich. Comp. Laws § 769.10 to be dismissed, but he agreed to have the particular State judge, rather than a jury, decide the degree of guilt.

But the record does not show that the bargain was broken. All that it shows is that the State trial court did not use the word "manslaughter" in finding Petitioner guilty of second-degree murder. As it is, it used language that strongly suggests that it in fact considered manslaughter as an option. If it considered only first-degree murder and second-degree murder, as Petitioner contends, then the court did not need to provide any analysis after rejecting first-degree murder. At that point, all that it needed to say was "therefore, I find defendant guilty of second-degree murder." Instead, however, the State trial court specifically found second-degree murder's elements:

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[9] *See Engle v. Isaac*, 456 U.S. 107, 134-135 (1982).

> The Court could not find any specific intent in this case. The Court could not find a premeditated murder. And so, murder one is out. But, I do think that murder two was well demonstrated. The Defendant [i.e., Petitioner] did great bodily harm to the victim knowing that he created a high risk of death, or great bodily harm knowing that death from such harm would likely result of [*sic*] his actions. And so, the Court does make a finding of Mr. Ruelas is guilty of second-degree murder under the laws of this State. [Decision on Degree Hearing, August 2, 2002, p. 4.]

The finding that second-degree murder was established would have been unnecessary if the only other option was first-degree murder.

Related to this point, the Sixth Circuit noted that "it was unclear whether manslaughter was a lesser included offense of murder" under Michigan law at the time of the plea. *Ruelas*, 580 F.3d at 409. But Michigan law provides that where "a court proceeds in a manner acceptable to all parties, it is not resolving a disputed point and thus does not ordinarily render a ruling susceptible to reversal."[10] In other words, where the State trial court considered the lesser offense of manslaughter, there would have been no basis for appeal for Petitioner and the prosecution when each side expressly agreed to allow the State trial court to consider manslaughter and that State trial court indicated that it would do so. Plea Hearing, July 17,

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[10] *People v. Riley*, 465 Mich. 422, 449; 636 N.W.2d 514 (2001).

2002, pp. 4-6. The State trial court explained the point in clear terms at the time of the plea:

> THE COURT: You could be found guilty of first degree murder, which is life without parole. Do you understand that? It's imprisonment for the rest of your natural life without ever getting out. On first degree. Second degree is life, and parole is possible. Do you understand that?
>
> MR. RUELAS: Yes sir.
>
> THE COURT: Third – The third factor that I can find, the third one would be manslaughter which is up to 15 years in prison. So, there's three things that I might find – find you of. One of the three. It could be life without parole, if it's first degree murder. If it's second degree murder, it's life with a possibility of parole. And then the last one is manslaughter which is up to 15 years in prison. [Plea Hearing, July 17, 2002, p. 6.]

This was a plea resolution.

Petitioner claims that this Court's analysis in *Puckett* is distinguishable from the facts in this case because the plea here was premised on a promise that "could not be fulfilled." Pet. 20. This is not true. Under Michigan law, the prosecution must honor its plea agreements. Regardless whether manslaughter was a lesser included charge of murder at the time of the plea, the parties all specifically agreed to have the State trial court consider first-degree murder, second-

degree murder, and manslaughter as already noted. Consequently, as a matter of due process, the prosecution was bound to abide by these terms or otherwise allow the criminal defendant to withdraw his plea.[11] There is nothing in Michigan law that prohibited the prosecution from agreeing to allow the State trial court to consider manslaughter as a lesser included offense as a part of the plea bargain.[12]

The record shows that the trial court found him guilty of second-degree murder, thereby rejecting a conviction for manslaughter. If Petitioner insists on the looking at the record alone, he is entitled to no relief. The plea was voluntary because Petitioner received the benefit of his bargain. Petition has failed to carry his burden of demonstrating otherwise.

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[11] *In re Guilty Plea Cases*, 395 Mich. 96, 127; 235 N.W.2d 132 (1975) ("If the judge determines that the plea agreement was not fulfilled, he shall, in his discretion, either amend the judgment of conviction [if the plea agreement can yet be fulfilled by such an amendment] or permit the defendant to withdraw his plea of guilty and vacate the judgment of conviction.").

[12] *See People v. Middleton*, 22 Mich. App. 694, 696; 177 N.W.2d 652 (1970) ("The statute does not impose an affirmative duty on the trial court to inquire whether a defendant who pleads guilty of murder is instead guilty of the lesser, included offense of manslaughter."). This suggests the corollary that there would be nothing improper about the parties agreeing to have the court consider manslaughter. In fact, as noted by the Sixth Circuit, manslaughter is now clearly considered a necessary lesser included offense of murder. *People v. Mendoza*, 468 Mich. 527, 544; 664 N.W.2d 685 (2003). And *Mendoza* was decided before Petitioner filed his appeals in State court.

2. Any remedy here would only require that the State courts expressly consider manslaughter – where there is virtually no evidence of adequate provocation.

Petitioner's only claim that the plea is involuntary rests on Michigan law disallowing manslaughter as an option at a degree-hearing despite what defense counsel and the State trial court said. In other words, the claim here is that there was a violation of the terms of the plea bargain. As this Court, however, pointed out just last year in *Puckett v. United States*, "recision is not the only possible remedy."[13] The Constitution allows specific performance as the remedy.[14]

Specific performance in the present case would mean nothing more than sending the case to the State trial court's successor to look at the evidence and specifically consider manslaughter as an option. Of course, given the paucity of evidence presented at the hearing that could support a manslaughter finding, no rational judge would find him guilty of manslaughter rather than second-degree murder. Therefore, whether or not a plea would ordinarily allow for harmless error analysis is really beside the point. This is not the case to decide such an issue. No need exists to grant this petition for a writ of certiorari.

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[13] *Puckett*, 129 S. Ct. at 1430.

[14] *Santobello v. New York*, 404 U.S. 257, 263 (1971).

3. Petitioner did not claim that he only pled guilty because there was consideration of manslaughter.

Even assuming a plea-bargain violation, Petitioner has not adequately alleged that his plea was involuntary. A petitioner claiming that his plea is involuntary must show a reasonable probability that, but for the error, he would not have pled guilty but would have insisted on going to trial.[15] In other words, he has not alleged that what was said about manslaughter as an option had anything to do with his decision to plead guilty. He made no such allegation in his motion to withdraw his plea. He made no such allegation in his application to the Michigan Court of Appeals. He made no such allegation in his application to the Michigan Supreme Court. In fact, he even failed to so allege in his habeas petition.

Therefore, the federal district court's statement that "Petitioner indicated in his state court motion to withdraw his guilty plea that he would not have pled guilty to open murder if he had known that his plea to open murder would have precluded the trial judge's consideration of a manslaughter conviction" (Pet. App. 36a) is incorrect. It is not in the record. All that Petitioner's motion to withdraw his plea said was:

> 9. Mr. Ruelas wishes to withdraw his guilty plea as it was made based upon incorrect information as to the offenses that the Judge could legally consider. [Motion to Withdraw Guilty Plea, filed August 25, 2003, p. 2.]

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[15] *Hill v. Lockhart*, 474 U.S. 52, 58-59 (1985).

Such an allegation is not the same as Petitioner alleging that he would have not pled in the first place. Instead, it says nothing more than Petitioner is legally entitled to withdraw his plea and he elects for the first time to do so now. Further, Petitioner's motion to withdraw his plea did not even comply with Michigan law. Any criminal defendant who claims that his plea is involuntary must supply an affidavit that contains "more than mere vague allegations."[16] Petitioner has not supplied that affidavit.

In the end, this case is not a good vehicle for deciding Petitioner's question. Not only is the record unclear, but Michigan's law is unique on this point so that any decision from this Court would have only limited jurisprudential value.

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[16] *People v. Boone*, 68 Mich. App. 650, 653; 244 N.W.2d 4 (1976).

CONCLUSION

Accordingly, the State of Michigan asks that this petition for a writ of certiorari be denied.

Respectfully submitted,

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